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IN THE

Supreme Court of the United States

October Term, 1962.

No. 139

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 5, 1963.

OPINIONS BELOW.

The opinion of the Interstate Commerce Commission is reported *United States v. Pennsylvania R. Co.*, 305 I. C. C. 259 (Appendix *infra*, p. 1a). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported 199 F. Supp. 586 (App. *infra*, p. 11a). The opinion of Circuit Judges Biggs, Staley and District Judge Leahy of the United States Court of Appeals for the Third Circuit is not yet reported but is printed in the appendix to this petition (App. *infra*, p. 17a).

JURISDICTION.

(a) The judgment of the United States Court of Appeals for the Third Circuit was entered April 5, 1963.

(b) The jurisdiction of this Court is invoked under the provisions of the Act of June 23, 1948, c. 641; 62 Stat. 928; 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below erred in holding that the Interstate Commerce Commission may lawfully determine that rates are unreasonable on grounds of 'overriding equity' when the Commission made no finding that the rates were unreasonable in and of themselves with regard to the service rendered and when there was no evidence before the Commission to sustain a finding that the rates were unjust or unreasonable in and of themselves with regard to the service rendered.

2. Whether the court below erred in holding, in disregard of the principle laid down in *Arizona Grocery Co. v. A. T. & S. F. Ry. Co.*, 284 U. S. 370, that the Commission in making a determination that was equivalent to an award of reparation could lawfully determine that the reasonable rate level for application to the shipments involved should be substantially below the level of rates which the Commission itself had prescribed in another proceeding.

STATUTES INVOLVED.

Section 1(5) of the Interstate Commerce Act, 49 U. S. C. Section 1(5) provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 15(1) of the Interstate Commerce Act, 49 U. S. C. Section 15(1) provides:

> "That, whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter

followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

STATEMENT OF THE CASE.

This case involves 62 interstate shipments of iron and steel articles, billets, and steel ingots which moved in 1941 and 1942 and were intended for export through the port of New York but were not exported there due to war conditions. They moved on bills of lading which acknowledged that the lading was "Received * * * subject to the classifications and tariffs in effect on the date of the issue of the original bill of lading * * *". The tariffs provided two sets of rates, the domestic rates and the export rates. The domestic rates on the iron and steel articles were on the basis prescribed by the Interstate Commerce Commission in *Iron and Steel Articles*, 155 I. C. C. 517, increased along with rates on all other traffic in accordance with the Commission's permissions in the general increase cases.[1] The export rates were lower than the domestic rates. They were voluntarily established by the railroads substantially below the domestic level in order to assist American manufacturers in meeting the competition of European producers in foreign markets. The tariff publishing the export rates contained a provision that the rates would apply only on traffic which was delivered by the carrier direct to the steamer or steamer's docks and which did not leave the

1. Ex Parte 115 (208 I. C. C. 4, 60); Ex Parte 123 (226 I. C. C. 41, 141); and Ex Parte 148 (248 I. C. C. 545, 612).

possession of the carrier at the port to which initially consigned. The present shipments were not exported through the port of New York and did ultimately leave the possession of the carrier at the port prior to exportation. Thus the conditions of the tariff rule were not complied with and the export rates to New York were not applicable. Because of this the domestic rates were the applicable rates. The respondents contend that the failure to meet the tariff conditions was attributable to circumstances over which the United States had no control and, therefore, the charges on the involved shipments were unjust and unreasonable to the extent they exceeded those based on the export rates. The reasonableness *per se* of the domestic rates and of the tariff condition was not challenged.

The issue was tried before the Interstate Commerce Commission. Without any evidence that the domestic rates and the tariff rules were unreasonable in and of themselves for the transportation service rendered, and without so finding, the Commission held that charges on the involved shipments based on the domestic rates were unreasonable to the extent they exceeded charges based on the export rates, solely because it was of the view that the United States had exercised due diligence to avoid noncompliance with the provisions of the export tariff—*United States v. Pennsylvania R. Co.*, 305 I. C. C. 259, at page 263.

The Railroad Company took the case to the District Court. It contended that the Commission had exceeded its statutory authority and that its order was void (a) when it declared the freight rates unreasonable for the transportation of the involved shipments under the attending circumstances without finding that the rates were unreasonable in and of themselves with regard to the service rendered; (b) when it ignored the fact that there is no evidence of record to sustain a finding that the aforesaid rates were unjust and unreasonable in and of themselves with regard to the service rendered; and (c) when it found that certain of the rates were unreasonable below the level

previously prescribed by the Commission itself in another proceeding, thus laying the basis for what is equivalent to an award of reparation in violation of the principle laid down by the Supreme Court in *Arizona Grocery Co. v. A. T. & S. F. Ry. Co.*, 284 U. S. 370, to the effect that when the Commission has prescribed a rate it may not later, after shipments have moved under it, declare that rate to have been unreasonable and award reparation against it.

The District Court (Kraft, J.) at *Pennsylvania Railroad Co. v. United States*, 199 F. Supp. 586, enjoined and set aside the Commission's order and remanded the case to the Commission saying:

> "* * * the reasonableness of a rate must be determined on the basis of transportation considerations, and not on such extraneous factors as the 'equities' of a given situation."

United States and Interstate Commerce Commission appealed to the United States Court of Appeals for the Third Circuit which on April 5, 1963 held that "the order of the court below will be reversed and the case remanded with the direction to dismiss the petition for want of equity." In support of its conclusion the Court said:

> "There can be no doubt that the Commission must rest its decisions on transportation policy. In the case at bar the Commission has stated the considerations that have moved its judgment though it has not expressly found that the export rate was reasonable, as in *General Carloading Co. Inc. v. Baltimore & O. R. Co.*, 266 I. C. C. 243 (1946), or stated any succinct test, albeit almost a subjective one, as in *Rogers v. Illinois Central R. Co.*, 311 I. C. C. 153 (1960). The considerations stated by the Commission seem to us to be in support of the national transportation policy, albeit it has not directly said so. It appears to us that the Commission properly has weighed all pertinent

factors, including some which the Railroad deems irrelevant.

"The considerations stated by the Commission" which seemed to the Court of Appeals to be in support of the national transportation policy are epitomized in that Court's opinion as follows:

> "The gist of the Commission's decision will be found, we believe, in the following paragraph: 'The question of the proper charges on "frustrated shipments," such as those here considered, has been before this Commission for determination in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited, an award of reparation was unopposed by the carriers. The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements. A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff.' See 305 I. C. C. p. 263. The Commission seemed to treat the fact that ODT certificates were procured for the 62 carloads as creating an overriding 'equity' which entitled the United States to the lower export rate.
>
> "In addition, the Commission pointed out that effective on December 28, 1942, after the shipments *sub judice* had moved, the Railroad had established a 'frustrated freight tariff' which would have been applicable to at least all but two of the shipments under consideration had the shipments been made on or after the date last mentioned."

REASONS FOR ALLOWING THE WRIT.

1. The Decision of the Court of Appeals Raises a Question of General Importance With Respect to the Interpretation and Application of the Rate Making Provisions of the Interstate Commerce Act Which Should Be Decided by This Court.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, this Court held that the Commission is not authorized to determine that a rate is unreasonable simply on the ground that a lower rate would be more equitable or more desirable as a matter of general policy and without regard to whether the rate is unreasonable in and of itself with regard to the service rendered. The Court of Appeals has rejected this principle by holding that even though the Commission made no finding that the rates in question were in and of themselves unreasonable with regard to service rendered and even though there was no evidence before the Commission on which such a finding could be based, the Commission's determination was properly based on "overriding equity". This decision extends the rate making powers of the Commission beyond the limits hitherto defined by this Court and does so in terms that may have application in a variety of situations apart from the particular facts here involved.

The declaration of unreasonableness by the Interstate Commerce Commission which has been sustained by the Court of Appeals is based upon a finding that the shippers had exercised due diligence to avoid noncompliance with the provisions of the export tariff. No evidence was submitted in an attempt to show that the tariff rule and rates were unreasonable in and of themselves for the transportation service rendered. There was no contention that the conditions of the export tariff were unreasonable in and of themselves. There was no contention that the domestic

rates were unreasonable in and of themselves. There was no finding by the Commission or the Court that the tariff conditions and the rates were unreasonable in and of themselves. As a matter of fact, the domestic rates on the iron and steel article were on the basis prescribed by the Commission itself and the export rates were voluntarily reduced by the railroads below that level because of the competitive situation. The finding of unreasonableness was based upon an extraneous matter or what the court terms an "overriding 'equity'" that is the inability of the United States to comply with the conditions of the export tariff for reasons beyond its control. Such a finding based upon other than transportation conditions is beyond the Commission's statutory power. It is contrary to the decision in *Southern Pac. Co. v. Interstate Commerce Com., supra.* In that case the Court held that the Commission did not have the power to condemn the raising of a rate from a low competitive basis to the normal level merely because the Commission thought that it could, under the law, protect the shipping interests involved from the consequences which it deemed would arise from a change of the rate. Also in point is *A. T. & S. F. Ry Co. v. Interstate Commerce Com.*, 190 Fed. 591. There the Commission attempted to prevent the railroads from increasing the rate on lemons from California to the east acting upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as to give the American industry protection against foreign competition. The Court held that the Commission's order was unlawful and void saying at page 594 of its decision:

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on trans-

portation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely."

Petitioner urged this point before the Court of Appeals and cited the authorities in support of it but the latter makes no mention of it in its opinion. On the contrary it has sustained an opinion of the commission which it surmises was based upon "an overriding 'equity'" and concludes with an order to dismiss the petition for want of equity. In purported support of its conclusion the Court stated that "the considerations stated by the Commission seem to us to be in support of the national transportation policy albeit it has not directly said so", but the Court has not suggested the justification for departing from consideration of transportation conditions alone, and in fact ignored them, basing the finding of unreasonableness solely upon what it considers equitable considerations.

The Court of Appeals seems to have placed reliance on a subsequent modification of the tariff which, had it been in effect at the time these shipments moved, would have permitted the assessment of the export rates. This circumstance is not determinative. The Commission has on numerous occasions held that a subsequent voluntary reduction of rates does not in itself justify a finding of unreasonableness of rates prior thereto—*Canadian Fruit Wholesaler's Assn. v. Atlantic C. R.*, 301 I. C. C. 187, 188.

2. The Commission's Decision and That of the Court of Appeals Sustaining It Are Contrary to the Principle Laid Down in Arizona Grocery Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370.

The United States paid the freight charges on the basis of the domestic rates. Subsequently, purporting to act pursuant to Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. § 66, the United States deducted from other freight charges due petitioner the difference between the export rate and the domestic rate as to each of the shipments. Petitioner sued in the Court of Claims, 28 U. S. C. § 1491, seeking to recover this difference. The Court of Claims suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates. Petitioner pointed out that all but two of the shipments presently involved moved on the basis of the domestic iron and steel rates which were prescribed by the Commission in *Iron and Steel Articles*, 155 I. C. C. 517, and that the rates prescribed were increased in accordance with the permissions granted by the Commission in the general rate-increase cases—the so-called *Ex Parte* proceedings, *supra*. Petitioner cited *Arizona Grocery Co. v. A. T. & S. F. Ry. Co.*, *supra*, which holds that when the Interstate Commerce Commission has prescribed a rate it may not later after shipments have moved under it declare that rate to have been unreasonable and award reparation against it. Petitioner stated that it recognized that the increases allowed in the *Ex Parte* proceedings were permissive and that the principle of the *Arizona Grocery* case had no application to such increases. However, the rates which the Commission has found to be reasonable for application on the present shipments are substantially below the basic level which the Commission prescribed and to the extent that the Commission has found the rates charged to be unreasonable below the previously prescribed level the finding is contrary to the principle cited.

CONCLUSION.

Petitioner is not suggesting that the Courts pass upon the reasonableness of the rates. It does urge that the considerations which the Commission and the Court used in passing upon the reasonableness of the rates exceed the statutory authority of the Commission. In *Southern Pac. Co. v. Interstate Commerce Com., supra,* the point at issue was stated at page 444 as follows:

> "What was the nature and the character of the order of the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?"

That is the question here. The Commission has condemned certain freight rates on the assumption that it has power which it does not actually possess and the Court below has sustained the Commission's order with the sweeping statement that it is in accordance with the national transportation policy and thus in effect holds that transportation considerations are no longer determinative.

For the reasons set forth above the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM F. ZEARFAUS,
EDWARD A. KAIER,
Attorneys for Petitioner.

APPENDIX A.

INTERSTATE COMMERCE COMMISSION

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

Decided November 12, 1958.

Just and reasonable charges on 75 carloads of iron and steel articles, steel ingots, and billets shipped from origins in Ohio, Pennsylvania, West Virginia, and Maryland to New York, N. Y., during 1941 and 1942, for export, but not exported through that port because of war conditions, determined. Proceeding discontinued.

George Cochran Doub, Lewis A. Dille, and *Paris T. Houston* for complainant.

J. C. Kenney for the Department of the Army.

William F. Zearfaus and *Paul F. McArdle* for defendant.

REPORT OF THE COMMISSION.

DIVISION 2, COMMISSIONERS WINCHELL, MURPHY, AND GOFF

BY DIVISION 2:

The modified procedure was followed. Oral hearing was held to permit the parties to examine certain witnesses with respect to matter introduced under the modified procedure, and for the introduction of additional evidence. Exceptions to the examiner's proposed report were filed by the defendant, and the complainant replied. Excep-

tions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

A petition by the defendant that we require certain witnesses to produce underlying data and documentary evidence relating to certain assertions made in the complainant's statement of facts and argument was denied by the Commission, as was a request by the defendant for oral argument. The defendant has filed a petition for reconsideration of the order denying its request for oral argument. No error in the order of denial is specified, nor is it shown that any substantial purpose would be served by granting oral argument. Accordingly, the petition is denied.

By petition filed on May 28, 1957, as amended, the complainant requests a finding that the charges sought to be collected by the defendant on 75 carloads of iron and steel articles, billets, and steel ingots, on the basis of the applicable domestic rates,[1] are unjust and unreasonable, and that the just and reasonable charges are those originally collected based on the corresponding export rates. The considered shipments moved from origins in Ohio, Pennsylvania, West Virginia, and Maryland, to the port of New York, N. Y., during the period December 1941 through November 1942, for exportation to Great Britain. However, because of war conditions, the shipments were not exported through that port, but were later exported through other ports and to Canada. The instant petition was filed pursuant to an order of the United States Court of Claims, dated April 3, 1957, in which the Court instructed the complainant, defendant in a proceeding pending before the Court, to institute this proceeding in order to obtain a determination by this Commission of the "proper charges to be applied to the shipments involved in this suit", the 75 shipments here considered. The defendant herein instituted

1. Rates are stated per 100 pounds, except where otherwise indicated.

the proceeding before the Court of Claims for judgment in the amount of the difference between the charges collected and charges based on the applicable domestic rates. The court proceeding is being held in abeyance pending our determination herein.

The shipments moved on commercial bills of lading which clearly indicated that the ladings were intended for export. Charges were prepaid by the shippers at the export rates. On 40 shipments of sheet steel originating at Canton, Ohio, in September 1942, the export rate charged was 28 cents; the corresponding domestic rate was 43 cents. On 21 shipments of billets from Sparrows Point, Md., in September 1942, the export and domestic rates were, respectively, $2.68 and $4.26 a gross ton; and on 10 shipments of tin plate from Follansbee, W. Va., during December 1941 and early January 1942, they were 23 cents and 36 cents. On 2 shipments of sheet iron from Butler, Pa., in April 1942, a shipment of steel ingots from Pencoyd, Pa., in September 1942, and a shipment of tin plate from Munhall (Irvin), Pa., in November 1942, the export rates charged were 24 cents, $2.45 a gross ton, and 24 cents, and the corresponding domestic rates were 38 cents, $4.08 a gross ton, and 38 cents.

Upon arrival at New York, the shipments were unloaded and placed in ground storage at Greenville piers or Manhattan Piers, which are railroad storage yards with lighterage facilities. Due to the activity of enemy submarines off the Atlantic coast and other conditions incident to the prosecution of the war, there was a lack of available shipping space and the shipments could not be loaded aboard vessels at New York for overseas destinations. Subsequently, 21 of the shipments were forwarded by rail to Hamilton, Ontario, Canada. The remaining 54 shipments were later transported from New York by rail and exported from other ports. All were eventually exported from west coast ports, except two of the shipments which respectively moved through New Orleans, La., and Balti-

more, Md. The rail charges from New York on the shipments are not at issue here.

The tariff in which the export rates were published contained a provision that such rates would apply only if traffic moving thereunder did not leave the possession of the carrier at the port to which initially consigned. The shipments were not exported through the port of New York, and did ultimately leave the possession of the originating carrier prior to exportation. Thus, the conditions of the tariff rule were not fully complied with, and the export rates were not applicable on these shipments to New York. The complainant concedes that the domestic rates charged were applicable.

After the shipments had been forwarded from New York, the defendant submitted to the Government supplemental bills for additional freight charges based upon the difference between the export and domestic rates applicable to the shipments to New York. These bills were paid without question, but upon further audit the amounts claimed were deducted from other amounts due the defendant.

Effective December 28, 1942, after these shipments had moved, the defendant established what is commonly known as its "frustrated freight tariff", containing rules governing the application of rates on shipments consigned to a port for export which, after arrival at the port, owing to the war emergency, were reshipped as new shipments to another port. They provided that if the traffic were reshipped to another port for export over a route over which the through rate from the point of origin to the port through which the shipments actually are exported did not apply, the export rate to the port originally consigned, plus the export rate from that port to the port through which the shipments were actually exported, would apply.

The complainant relies principally upon the following: (1) the shipments were marked "for export" and were consigned to the British Ministry of War Transport; (2) on at least 62 of the shipments arrangements for vessel space

were made prior to shipments; (3) each shipment was in continuous possession of the carrier until forwarded from New York by rail; (4) all conditions of the export tariff were complied with except actual delivery to shipside at New York; (5) failure to export through the port of New York was due to conditions beyond the control of the parties; and (6) the export tariff was amended shortly after the shipments moved so that shipments moving under like circumstances thereafter were accorded the export rates.

During the period of movement of most of these shipments, the Office of Defense Transportation was charged with the responsibility of governing the movement of traffic to the ports with a view of preventing congestion and insuring the free movement thereto of war materials. Its general order O. D. T. 16, issued July 6, 1942, provided, among other things, that shipments to ports could be made only after issuance by that agency of a permit called "O. D. T. block permit." Such a permit was issued covering a specified shipment only when definite cargo space at the port was then available or suf ient assurances were received by O. D. T. officials that cargo space would be available within a reasonable time after the arrival of the freight at the port. The shipping papers were required to make reference to such a permit by number, and the bills of lading covering 62 carloads bore the notation "O. D. T. block permit" with appropriate numbers. Twelve shipments moved prior to the issuance of the general order and necessarily show no reference to such a permit. The bill of lading covering one carload of sheet steel shipped on September 23, 1942, from Canton also failed to show such permit information. Although the complainant contends that cargo space had been arranged prior to shipment for all 75 carloads, there is no factual evidence of record to substantiate such a contention as to the aforementioned 13 shipments.

The defendant argues that the record does not substantiate the claim that the cargo reservation was made on

any of the 75 shipments. It asserts that the mere showing of the O. D. T. permit number on the bill of lading does not constitute sufficient evidence that cargo space was reserved. It emphasizes that general order O. D. T. 16 permitted the issuance of an "O. D. T. block permit" in circumstances where it was found that cargo space would be available within a reasonable time after the arrival of the freight, and contends that it should be afforded an opportunity to determine whether those responsible for issuing the permits did so on the chance that space would be available but without definite knowledge of the fact. It renews its exception, made at the oral hearing, to the Commission's denial of its request that witnesses testifying as to the circumstances surrounding the issuance of such permits be required to produce the underlying data upon which their conclusions are based. That request was denied on the ground that, among other things, any documents produced would be in substantiation of evidence previously submitted by the complainant, and any insufficiency of such evidence may properly be determined after cross-examination of witnesses. These witnesses testified, on cross-examination, that prior reservation of cargo space was a condition precedent to the issuance of a permit and that the permits here in question were issued in the regular course of business. The defendant produced no evidence to the contrary. In our opinion, the notations appearing on the bills of lading, together with the oral and written testimony of the complainant's witness with respect thereto, sufficiently establish that cargo space had been arranged prior to the movement of 62 of the shipments.

The question of the proper charges on "frustrated shipments" such as those here considered, has been before this Commission for determination in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited an award of reparation was unopposed

by the carriers. The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements. A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff. The defendant, however, submits that the theory of diligence or lack of diligence in arranging for vessel space is far outweighed by other considerations incident to the rates here under attack. The record does not substantiate this view.

In *Pacific Chemical & Fertilizer Co. v. Pennsylvania R. Co.*, 268 I. C. C. 468, decided May 21, 1947, the Commission found that the complainant failed to exercise due diligence in arranging for the delivery and ocean transportation of its shipments, thereby precluding an award of reparation to the basis of the export rates. It viewed the findings in a number of proceedings on this subject which are pertinent here, stating, at pages 471-472:

> In *California Texas Oil Co. v. Bessemer & L. E. R. Co.*, 264 I. C. C. 147, division 3 found that domestic rates applicable on exported traffic, because it had left the possession of the carrier in circumstances like those which affected the shipments under consideration, were not shown to have been unreasonable. The division said at page 149:
>
> > Division 2 in *C. B. Fox Co. v. Gulf M. & O. R. Co.*, 246 I. C. C. 561, *River Petroleum Corp. v. Yazoo & M. V. R. Co.*, 258 I. C. C. 1, and *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I. C. C. 422, found that charges higher than those based on coastwise or export rates on shipments which could not be exported or moved coastwise because of war conditions, were unreasonable under circumstances shown. When

the shipments involved in the instant proceeding were forwarded from origins the complainants were aware of the war conditions affecting exportations from New York, yet they made no prior arrangements for vessel space for transshipment beyond that port. In short, they were willing to take a chance of obtaining the necessary vessel space. The situation in this respect is no different from that disclosed in a similar proceeding, *Hanlon-Buchanan, Inc. v. Burlington-R. I. R. Co.*, 258 I. C. C. 519, the dismissal of which by the Commission was affirmed in its report on further hearing, 263 I. C. C. 603, decided October 2, 1945. There, the Commission accorded substantial and apparently controlling weight to the fact that the complainant made no prior arrangement for vessel space. See also the report of Division 3 in *American Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605, dismissing a similar complaint. A petition subsequently filed by complainant in that proceeding for reconsideration was denied by the Commission. Moreover, in neither of those proceedings did the fact of subsequent modification of the restrictive provisions affecting the application of export rates to so-called "frustrated" shipments influence the decisions therein.

In the second report in *Hanlon-Buchanan, Inc. v. Burlington-Rock Island R. Co.*, 263 I. C. C. 603, the Commission discussed the proceeding referred to in the quotation above and as to the three decisions by division 2, said, at page 605:

> In each of those proceedings the complainants exercised diligence in arranging for sale of the commodities shipped and for the vessel space prior to shipment from origins, and the failure of the

traffic to move in export or coastwise commerce from the ports was due to causes beyond their control.

The foregoing discussion is applicable to the facts before us in this proceeding.

The domestic rates sought to be charged on these shipments, other than the 21 shipments of billets and the one shipment of steel ingots, are on the basis of the distance scale of maximum reasonable rates prescribed by the Commission for application within official territory on iron and steel articles in *Iron and Steel Articles*, 155 I. C. C. 517, plus subsequent general increases. The defendant claims the benefit of the well-known principle laid down by the United States Supreme Court in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, to the extent that the domestic rates included amounts prescribed by the Commission. In that proceeding, the Court held that where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, by declaring its own prior finding as to reasonableness to be erroneous, subject a carrier which has conformed thereto to the payment of reparation measured by what the Commission at such later time declares it should have decided in the earlier proceedings to be a reasonable rate. The defendant urges that the Commission-prescribed rates sought to be collected cannot be found to be unlawful, and contends that charges computed on such basis thus are the "proper charges" on the considered shipments.

In the case cited, the Supreme Court stated, on page 391, that the ". . . case turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it." In the instant proceeding, no reparation is sought and none will here be awarded. The complainant does not assail the reasonableness of the domestic rate, as such, but alleges that charges based thereon, in view of the fact that the shipments ultimately were exported

and of the extraordinary circumstances shown in connection therewith, were unjust and unreasonable to the extent that they exceeded those based on the export rates from and to the same points. We find that the defendant's contention in this respect is without merit. Under somewhat similar circumstances a like finding was made by division 3 in *Standard Oil Co. of New Jersey v. Pittsburgh & L. E. R. Co.*, 259 I. C. C. 793, 797.

We find that on 62 of the shipments here concerned; that is, 39 carloads of sheet steel shipped from Canton, 21 carloads of billets shipped from Sparrows Point, 1 carload of steel ingots shipped from Pencoyd, and 1 carload of tin plate from Munhall, the charges based on the domestic rates were unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments from and to the same points. We further find that just and reasonable charges on the remaining 13 shipments; that is, 10 carloads of tin plate from Follansbee, 2 carloads of sheet iron or steel from Butler, and 1 carload (RI 142881) of sheet steel from Canton, are those sought to be collected on the basis of the domestic rates.

An order will be entered discontinuing the proceeding.

APPENDIX B.

[Caption omitted.]

OPINION OF THE UNITED STATES DISTRICT COURT.

KRAFT, *J.*

The history of this case sufficiently appears in the opinion on the appeal from the Court of Claims in the same matter. Pennsylvania Railroad Co. v. United States, 363 U. S. 202 (1960):

"In 1941 and 1942 the United States made 75 shipments of iron and steel over the Pennsylvania Railroad intended for export from the port of New York to Great Britain. War conditions prevented exportation from New York. This caused a dispute about applicable transportation charges since the Pennsylvania had in effect tariffs for 'domestic rates' that were higher than 'export rates.' Since the goods were not exported as planned the Railroad billed the United States for the higher domestic rates which the Government paid because required to do so by § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. § 66. Later, under authority of the same section, the General Accounting Office deducted from other bills due the Railroad the difference between the higher and lower rates, claiming that the higher domestic rates were inapplicable, unreasonable and unlawful. The Railroad then brought this action in the Court of Claims to recover the amount deducted.

"Properly relying on our holding in *United States v. Western Pacific R. Co.*, 352 U. S. 59, 62-70, the Court of Claims suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates. After hearings the Commission found

and reported that the domestic rates were 'unjust and unreasonable' as to 62 of the shipments but 'just and reasonable' as to 13. 305 I. C. C. 259, 265."

The Railroad then invoked the jurisdiction of this Court under 28 U. S. C. 1336, 1398, and 49 U. S. C. 17(9), to enjoin and set aside the order. It is unnecessary to review here the action of the Court of Claims which resulted in the appeal to the Supreme Court. The case is now before us on cross motions for summary judgment.

We are concerned here only with the rates on the 62 shipments. As a matter of interest, however, we point out that the Commission applied the higher domestic rates to the 13 shipments because as to them it found no evidence to support the Government's contention that cargo space had been arranged prior to shipment.

The Commission's report states that, "The complainant (the Government) concedes that the domestic rates charged were applicable." At another place the report states: "The complainant does not assail the reasonableness of the domestic rates, as such, but alleges that charges based thereon, in view of the fact that the shipments ultimately were exported and of the extraordinary circumstances shown in connection therewith, were unjust and unreasonable to the extent that they exceeded those based on the export rates from and to the same points." The Government's position, as thus accurately stated, seems to us to embody an inner contradiction. In United States v. Western Pacific Railroad Co., 352 U. S. 59, 68, the Supreme Court referred to "the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied," and used language equally descriptive of the Government's position in the instant case:

> "For the Government's thesis on the issue of reasonableness is not that the rate on incendiary bombs is, in general, too high. It argues only that the rate 'as applied' to these particular shipments is too high

—i.e., that since the expenses which have to be met in shipping incendiaries have not been incurred in this case, the carriers will be making an unreasonable profit on these shipments. This seems to us to be but another way of saying that the wrong tariff was applied. In both instances the issue is whether the factors which call for a high rate on incendiary bomb shipments are present in the shipment of bomb casings full of napalm gel but lacking bursters and fuses."

The Commission's conclusions seem to us to be equally inconsistent. Its report states: "The tariff in which the export rates were published contained a provision that such rates would apply only if traffic moving thereunder did not leave the possession of the carrier at the port to which initially consigned. The shipments were not exported through the port of New York, and did ultimately leave the possession of the originating carrier prior to exportation. Thus, the conditions of the tariff rule were not fully complied with, and the export rates were not applicable on these shipments to New York." Nevertheless, the Commission proceeded, in effect, to apply these very export rates: "We find that on 62 of the shipments here concerned . . . the charges based on the domestic rates were unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments from and to the same points."

So far as we are advised, no one challenged the inherent reasonableness of the domestic rates. As the Commission pointed out, the Government did not attack "the reasonableness of the domestic rate, as such." In consequence, we think the only issue properly before the Commission was which rate was applicable to the shipments in question. The situation seems to us to be in no way distinguishable from that in United States v. Chesapeake and Ohio Railway Co., 224 F. 2d 443 (4th Cir. 1955), a closely analogous case. As the Court there viewed the issue (p. 444):

"The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide."

On appeal, the Supreme Court agreed with the first part of this statement (352 U. S. 77, 80):

"Unlike the Court of Claims in *United States v. Western Pacific R. Co., supra*, the Court of Appeals, correctly we think, regarded the questions of whether the domestic tariff applied to these shipments, and whether it was reasonable if so applied, as simply two ways of stating the same underlying problem."

However, the Court held that the question of which tariff applied, domestic or export, might be one for the Commission, as the Court of Appeals should determine upon a full record (p. 80).

In the case at bar, the Commission ruled that the domestic rate applied, but that such rate was "unjust and unreasonable" to the extent that it exceeded the export rate. It did not find that the domestic rate was unjust and unreasonable in and of itself for the transportation service rendered. To the contrary, the Commission seems to have based its conclusions on several extraneous factors, i.e., that the shipments were ultimately exported from ports other than New York; that vessel space had been reserved (as respects 62 shipments) prior to shipment to New York; that on December 28, 1942, after these shipments had moved, the Railroad established its so-called "frustrated freight tariff," which applied the export rate in such situation as this.

We believe that the Commission's action was without support in the law or the evidence, and exceeded its statutory powers. We recognize, of course, that all charges for transportation service must be just and reasonable. 49 U. S. C. 1(5). It is equally clear, however, that the reason-

ableness of a rate must be determined on the basis of transportation considerations, and not on such extraneous factors as the "equities" of a given situation. In Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission, 190 Fed. 591 (Commerce Ct. 1911), the Court held void as beyond the powers delegated to the Commission an order based primarily on assumed authority to protect an industry against foreign competition. The opinion carefully defined the scope of the Commission's authority to prescribe rates (p. 594):

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the tariff will move freely."

To the same effect, see Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433 (1911); Atlantic Coast Line R. Co. v. Trammell, 287 Fed. 741 (D. C. N. D. Ga. 1923).

It is unavailing to say that the Railroad suffered no additional expense or inconvenience by reason of the non-export of the shipments from New York. The same might be said of a shipment not originally intended for export. It is recognized on all sides that the differential between ex-

port and domestic rates is not based on any distinction in the quantity or character of the services rendered. J. G. Boswell Co. v. Atchison T. & S. F. Ry. Co., 216 I. C. C. 522.

ORDER.

Now, November 30th, 1961, it is ordered and adjudged that the order of the Interstate Commerce Commission with respect to the 62 shipments be, and it is, enjoined and set aside as without support in the law or the evidence and in excess of its statutory powers; and the matter is remanded to the Commission for further action consistent with this order.

C. WILLIAM KRAFT, JR.,
Judge.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,021

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 7, 1962

Before BIGGS, *Chief Judge*, and STALEY, *Circuit Judge*, and LEAHY, *District Judge*.

OPINION OF THE UNITED STATES COURT OF APPEALS.

(Filed April 5, 1963)

By BIGGS, *Chief Judge*.

The problem presented by the case at bar is a difficult one. On various dates in 1941 and 1942, 75 carloads of iron and steel articles were shipped via The Pennsylvania Railroad Company from various points in Ohio, West

Virginia and Maryland to the Port of New York for export to the British Ministry of War Transportation. The shipments moved on "prepaid"[1] bills of lading which acknowledged that the lading was "Received . . . subject to the classifications and tariffs in effect on the date of the original bill of lading . . ." There is no question but that the tariffs, thus made part of the contracts of transportation, provided two sets of shipping rates to the Port of New York from the origins designated in the bills. One set of tariffs prescribed applicable domestic rates and the other set up rates applicable to export shipments. The export rates were substantially lower than the domestic rates.[2]

The tariffs applicable to the export rates provided that the export rates should apply only to shipments that were delivered by the carrier direct to the steamer or steamer's docks and which did not leave the possession of the carrier at the port to which they were consigned originally, prior to exportation.[3]

General Order O. D. T. 16, 7 F. R. 5194, issued on July 6, 1942, provided that shipments of iron and steel to ports for export could be made only after issuance by the Office of Defense Transportation of a permit called an "ODT block permit". Such a permit was to be granted

1. That the shipments were prepaid seems to be conceded by the parties.

2. The export rates, first established in 1903 at the request of manufacturers in the United States, were created voluntarily by the railroads of the United States to enable the manufacturers in this country to develop foreign trade in competition with European producers and manufacturers.

3. The specific tariff provision is as follows: "Rates named herein and designated as 'Export Rates' will apply only on traffic which does not leave the possession of the carrier delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's docks upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given."

covering a specified shipment only when definite cargo space at the designated port was available or assurances were received by the issuing officials that within a reasonable time after the arrival of the freight at that port, cargo space would become available. Shipping papers, such as bills of lading, were required to make reference to the ODT permit by number and the bills of lading covering 62 of the 75 carloads bore the notation "ODT block permit" with an appropriate number. Twelve of the carloads were shipped prior to the issuance of O. D. T. 16 and, of course, moved without block permits. One carload was shipped on a bill of lading which failed to show any ODT block permit.

When the 75 carloads reached the Port of New York, due to enemy submarine activity and other wartime causes[4] there was no cargo space available. The contents of the cars were unloaded and put in ground storage at Greenville or Manhattan piers, railroad storage yards with lighterage facilities. Later, if this fact be pertinent, the contents of the 75 cars were shipped by rail from the Port of New York to various destinations.[5]

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4. Not clearly developed in the record.

5. There is confusion in the record on this point. The report of the Commissioner states, para. "8", in this connection: "Twenty-one of the shipments were subsequently exported by rail to the Metal Reserve Company, c/o Steel Company of Canada, Hamilton, Ontario. The United States Government did not pay the freight charges on this movement. All of the freight charges were paid by the Steel Company of Canada. The remaining 54 shipments were transported by rail to other ports in the United States and were exported from such ports."

The Report of the Commission, Division 2, states, however, 305 I. C. C. 260-261: "Upon arrival at New York the shipments were unloaded and placed in ground storage at Greenville piers or Manhattan Piers, which are railroad storage yards with lighterage facilities. Owing to the activity of enemy submarines off the Atlantic coast and other conditions incident to the prosecution of the war, there was a lack of available shipping space, and the shipments could not be loaded aboard vessels at New York for overseas destinations. Subsequently, 21 of the shipments were forwarded by rail to Hamilton, Ontario, Canada. The remaining 54 shipments were later transported from New York by rail and exported from other ports. All were eventually

We are concerned only with the charges from the points of origin to the Port of New York. When the shipments were not exported from the Port of New York, the Railroad submitted supplemenal bills claiming the higher "domestic" rates. Pursuant to the provisions of Section 322 of the Transportation Act of 1940, 49 U. S. C. § 66, the charges were paid. But after audit, the Government Accounting Office disallowed the supplemental charges. On the Railroad's failure to make refunds as requested, the additional charges were deducted from sums due the Railroad for other transportation services. The suit at bar was brought to recover the amounts of these deductions. The Railroad moved for summary judgment. The United States filed a cross-motion to the same effect. The court below decided in favor of the Railroad, 199 F. Supp. 586 (1961), and the appeal at bar followed.

Prior thereto, the issue as to what were the correct rates to be charged had come on for hearing before the Interstate Commerce Commission (Division 2), pursuant to the direction of the Supreme Court [6] and the Commission, after hearings, held, 305 I. C. C. 259 (1958), that charges based on the domestic rates on these carloads which did not have ODT block permits were just and reasonable, while charges based on the domestic rates on these carloads which had ODT block permits were not; *i.e.*, that the Railroad was entitled to domestic rates on 13 carloads but was not en-

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exported from west coast ports, except two of the shipments which, respectively, moved through New Orleans, La., and Baltimore, Md. *The rail charges from New York on the shipments are not at issue here.*" (Emphasis added.)

The parties to the litigation apparently are in complete accord with the statement made in the italicized sentence quoted immediately above and have pitched their respective arguments on the issue of the propriety of the rates, domestic or foreign, to be charged by the Pennsylvania Railroad from the points of consignment to the port of New York. Nothing in the record that we can find or that has been pointed out to us by the parties serves to enlighten us further.

6. See Pennsylvania R. Co. v. United States, 363 U. S. 202 (1960).

titled to domestic rates on 62 carloads. The gist of the Commission's decision will be found, we believe, in the following paragraph: "The question of the proper charges on 'frustrated shipments,' such as those here considered, has been before this Commission for determination in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited, an award of reparation was unopposed by the carriers. The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements. A prime factor for consideration in complaints involving shipments of 'frustrated freight' is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff." See 305 I. C. C. p. 263.[7] The Commission seemed to treat the fact that ODT certificates were procured for the 62 carloads as creating an overriding "equity" which entitled the United States to the lower export rate.

In addition, the Commission pointed out that effective on December 28, 1942, after the shipments *sub judice* had moved, the Railroad had established a "frustrated freight tariff"[8] which would have been applicable to at least all but two of the shipments under consideration had the shipments been made on or after the date last mentioned.[9]

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7. The United States did not seek to review the Commission's decision as to the allowance of domestic rates on the 13 carloads.

8. The rules created by this tariff provided that if the traffic, owing to the war emergency, were reshipped to another port for export over a route over which the through rate from the point of origin to the port through which the shipments actually were exported, did not apply, the export rate, to the port originally consigned, plus the export rate from that port to the port through which the shipments were actually exported, would apply. See 305 I. C. C. at p. 261.

9. Cited in the Report, 305 I. C. C. 259 *et seq.* is Pacific Chemical & Fertilizer Co. v. Pennsylvania R. Co., 268 I. C. C. 468 (1947), in which the Commission found, in the absence of a provision for

The Railroad asserts that the Commission has in effect exacted reparations and that it may not do this under Arizona Grocery v. Atchison Ry., 284 U. S. 370 (1932), that all shipments in the 62 cars, save one shipment of steel ingots,[10] moved on the basis of rates "prescribed" by the Commission in Iron and Steel Articles, 155 I. C. C. 517 (1929), as increased by Commission "permissions"[11] and (to employ the Railroad's own descriptive terms), that the rates which the Commission has found applicable were substantially below the basic levels which the Commission had itself "prescribed". We think that the *prescribing* referred to by the Railroad in Iron and Steel Articles, *supra*, was to the domestic rates which the Commission did make

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application of export rates on carloads of sulphate of ammonia fertilizer from interior points in the United States to Richmond, California, where the fertilizer was stored in a public warehouse and reforwarded to Oakland and San Francisco and then exported to the Hawaiian Islands, that domestic rates were not unreasonable and allowed them. In this case the Military Governor of the Hawaiian Islands had established a permit system substantially similar to the ODT permit system in the case at bar, and the Fertilizer Company had not taken adequate steps to assure itself that shipping would be available for its fertilizer. These factors furnished the basis for allowing the Railroad the domestic rate.

In its report in the case at bar the Commission referred *inter alia* to California Texas Oil Co. v. Bessemer & L. E. R. Co., 264 I. C. C. 147 (1945), and Division decisions in C. B. Fox v. Gulf, M. & O. R. Co., 246 I. C. C. 501 (1941) (shipments were never exported), River Petroleum Corp. v. Yazoo & M. V. R. Co., 258 I. C. C. 1 (1944), and to Midcontinent Petroleum Corp. v. Illinois Central R. Co., 258 I. C. C. 422 (1944). The substantial basis of decision in the cited cases was that the shippers made no prior arrangement for cargo space and therefore had not exercised due diligence.

10. Not identified in the briefs or argument as to carloads. There seems to be a disagreement as to the relevant facts on this point. See 305 I. C. C. 265.

11. See Ex parte 115 (208 I. C. C. 4, 60 (1935)); Ex parte 123 (226 I. C. C. 41, 141 (1938)); and Ex parte 148 (248 I. C. C. 545, 612 (1942)). In each Report reference is made to Arizona Grocery v. Atchison Ry., 284 U. S. 379 (1932), and it is conceded by all that the principle of that case will have no application to the rate increases granted.

applicable.[12] But the Railroad expressly concedes that the effect of the "*Ex Parte* proceedings" was "permissive" only and that the Arizona Grocery decision cannot be employed as a basis for domestic rate "increases". The Commission says it is not exacting reparations but is relieving the shipper of an unjust rate. It is clear, however, that one of the conditions of the export tariff as filed by the Railroad was not fulfilled in order that the export rate could apply, *i.e.*, the shipments did leave the possession of the Railroad at the Port of New York. See note 3, *supra*. The Railroad had to collect the rates the tariff called for and those were the domestic rates, the meaning of which had been determined by the Commission in Iron and Steel Articles. See Cranger v. Lowden, 315 U. S. 631, 635 (1942): "Until changed, tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service . . .", citing Lowden v. Simons-Shields-Lonsdale Grain Co., 306 U. S. 516, 520 (1939).

As we have said the Commission has expressly disclaimed reparations as the basis for refusing the Railroad

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12. The Railroad's argument is not clear to us. We think that the decision was cited by the Railroad in support of the domestic rate though a brief paragraph contained in the Report deals with "Export Rates". It is as follows: "Export Rates: Much evidence with respect to export rates was received. At the time of the hearings export rates to the north Atlantic ports were in effect generally on the basis of 75 per cent of the domestic rates. Subsequently the carriers filed schedules proposing to reduce the export rates to the basis of approximately 60 per cent of the domestic rates, and to increase the minimum weight in connection therewith from 30,000 pounds to 45,000 pounds. Various requests for the suspension of these schedules were filed, the principal protests coming from steel producers on or near the seaboard. After careful consideration we declined to suspend the schedules and they became effective December 31, 1927. The schedules were filed to expire on December 31, 1928, unless sooner canceled, changed, or extended. They have since been extended to December 31, 1929. In view of these facts export rates will not be further considered in this proceeding." 155 I. C. C. at p. 538.

recovery. It falls back on Standard Oil Co. of New Jersey v. Pittsburgh & L. E. R. Co., 259 I. C. C. 793, 797 (1945). As we read it, the cited case is one in which it was found that the "charges assailed, based upon the domestic rate . . . ., were unjust and unreasonable . . ." under circumstances very similar to those at bar.

Section 1(5) of the Interstate Commerce Act, 49 U. S. C. A. § 1(5) provides that charges for transportation must be just and reasonable. The question of reasonableness is one of fact. Illinois Cent. Ry. Co. v. Interstate Commerce Commission, 206 U. S. 441 (1907). There is authority to the effect that the status of the shipment of military stores by a common carrier should be determined at the time of the shipment, Sonken-Galamba Corp. v. Union Pacific R. Co., 145 F. 2d 808, 812 (10 Cir. 1944), cited in Northern Pac. Ry. Co. v. United States, 101 F. Supp. 29, 31 (D. C. Minn. 1951), and the shipments at bar were received as export shipments but subject to tariff conditions. But the issue of reasonableness of rates charged is one which Congress saw fit to entrust solely to the Commission, Union Pac. R. Co. v. United States, 111 F. Supp. 266 (Ct. Cls. 1953), albeit if the issue is one as to which of two rates shall apply that matter is also one for the courts. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285 (1922). There can be no doubt that the Commission must rest its decisions on transportation policy. In the case at bar the Commission has stated the considerations that have moved its judgment though it has not expressly found that the export rate was reasonable, as in General Carloading Co. Inc. v. Baltimore & O. R. Co., 266 I. C. C. 243 (1946), or stated any succinct test, albeit almost a subjective one, as in Rogers v. Illinois Central R. Co., 311 I. C. C. 153 (1960).[13] The considerations

13. See 311 I. C. C. at p. 156: "We do not believe that the frustrated freight doctrine should be applied where, as here, the shipper had no reasonable grounds for believing that lawful exportation could be accomplished."

stated by the Commission seem to us to be in support of the national transportation policy, albeit it has not directly said so. It appears to us that the Commission properly has weighed all pertinent factors, including some which the Railroad deems irrelevant. We may remark parenthetically that we do not find that the Commission's decision in respect to the 62 carloads was based on sympathy for the United States. What the Commission in fact has done, as it has in some of the other decisions, cited in this opinion, is to provide for just and reasonable charges on the 62 carloads with which we are concerned. Cf. United States v. Chesapeake & Ohio Rwy. Co., 352 U. S. 77, 80 (1956). The fact that the Commission has disclaimed the application of the reparations principle does not disturb us. The case at bar involves more than an exercise in semantics.

As indicated, we believe that the court below erred in its conclusions. What was stated in Crancer v. Lowden, *supra*, at p. 635, although in a somewhat different connotation is pertinent here. Mr. Justice Byrnes said: "The issue of the reasonableness of the rates was not open to the District Court." That issue is not open to this court either.

The order of the court below will be reversed and the case remanded with the direction to dismiss the petition for want of equity.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 139

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The report of the Interstate Commerce Commission (Pet. 1a-10a) is reported at 305 I.C.C. 259. The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. 11a-16a) is reported at 199 F. Supp. 586. The opinion of the United States Court of Appeals for the Third Circuit (Pet. 17a-25a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1963. The petition for a writ of certiorari was filed on May 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below was correct in sustaining the determination of the Interstate Commerce Commission that the charges sought by the petitioner railroad were unreasonable as applied in the particular circumstances of this case.

STATUTE INVOLVED

Section 1(5) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(5) provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property * * *, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

STATEMENT

Petitioner brought this action to obtain review of a determination made by the Interstate Commerce Commission, in the exercise of its primary jurisdiction on referral from the Court of Claims,[1] that certain freight charges sought by petitioner on government ship-

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[1] Petitioner's right to judicial review of the Commission's order in the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. 1336 and 1398, and § 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9), was decided in *The Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202.

ments made in 1941 and 1942 were, in light of th relevant circumstances, unreasonable.

The shipments consisted of 62 carloads of iron and steel articles which moved from interior points of origin in the United States to the port of New York for exportation to Great Britain as lend-lease materials. Tariffs in effect at the time of the shipments provided two sets of rates, domestic and export. The domestic rates were applicable to domestic shipments generally; the export rates, which were substantially lower, were applicable to shipments for export which were (1) delivered by the carrier direct to the steamer or steamer's docks and (2) did not leave the possession of the carrier at the port to which initially consigned. The shipments here in question moved on commercial bills of lading which clearly indicated that they were intended for export, and charges were prepaid at the export rates (Pet. 2a-3a). In addition, the shipping papers carried an Office of Defense Transportation "block permit", essential for the movement of all shipments for export, which showed that cargo space had been arranged prior to the rail movement (Pet. 5a-6a).

When the shipments reached the port of New York, they were unloaded in ground storage at railroad piers. However, because of enemy submarine activity off the Atlantic coast and other wartime conditions, they could not be loaded aboard vessels at New York for overseas destinations as intended. Subsequently, part of the shipments were forwarded by rail to Canada and the remainder were transported from New York by rail and exported from other ports. Consequently, the conditions of the tariff rule relative to export rates were not literally satisfied (Pet. 3a-4a).

Petitioner thereupon submitted to the government supplemental bills for additional freight charges based upon the difference between the export and domestic rates for the transportation from the interior points to New York. Upon audit, the General Accounting Office disallowed the supplemental charges, and petitioner sued in the Court of Claims to recover them. The court in turn referred to the Commission the question of the "proper charges to be applied to the shipments involved" (Pet. 2a).

The government did not challenge the reasonableness of the domestic rates *per se*, but, rather, maintained that charges based on the domestic rates, as applied in the extraordinary circumstances pertinent to these shipments, would be unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments between the same points. It relied upon the following facts: (1) the shipments were marked "for export" and were consigned to the British Ministry of War Transport; (2) charges were prepaid at the export rates; (3) arrangements for vessel space were made prior to shipment; (4) each shipment was in continuous possession of the carrier until forwarded from New York by rail; (5) all conditions of the export tariff were complied with, except actual delivery to shipside at New York; and (6) failure to export through the port of New York was due to conditions beyond the control of the parties (Pet. 3a, 4a-5a). The Commission agreed. The gist of its decision, as the court below observed (Pet. 6a-7a), was this:

> The question of the proper charges on "frustrated shipments" such as those here considered, has been before this Commission for determina-

> tion in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited an award of reparation was unopposed by the carriers. *The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements.* A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff. * * * (Emphasis added.)

In addition, the Commission pointed out that, effective December 28, 1942, after these shipments had moved, petitioner established a "frustrated freight tariff" which prospectively accorded the export rates to shipments encountering similar difficulties (Pet. 4a).

The district court set aside the Commission's ruling, holding that it had exceeded its authority because it had determined that the domestic rates were unreasonable on the basis of factors extraneous to transportation considerations (Pet. 14a-15a). The court of appeals reversed, reasoning that the Commission "properly has weighed all pertinent factors" and that what the Commission in fact had done was "to provide for just and reasonable charges" on these particular shipments, thus determining the issue of reasonableness "which Congress saw fit to entrust solely to the Commission" (Pet. 24a-25a).

ARGUMENT

1. The Commission's determination that the rates, as here applied, were unreasonable has a rational basis in the record, and the decision below, sustaining the Commission's order, raises no issue of general importance warranting further review.

Export rates on numerous commodities are characteristically lower than domestic rates covering shipments between the same points. The purpose of the differential, as the Commission has frequently noted,[2] is the generation or attraction of traffic which the railroads would not otherwise obtain. As is obvious, the tariff rules were designed to make certain that such "export" rates would apply only on traffic which was *bona fide* traffic for overseas shipment. In other words, the rules were devised to obviate the perpetration of fraud upon the railroads by the shippers' sending traffic between interior points purportedly for export, but in fact intended for domestic use, and thereby depriving the railroad of proper revenue on purely domestic traffic which it would otherwise carry as such.[3]

In the final analysis, the matter comes down to this. From the carrier's standpoint, the "frustration" of an export shipment due to conditions beyond the control of either party to the contract of shipment does not confer an additional burden. The same services are provided by it whether exportation takes place or

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[2] See, *e.g.*, *War Materials Reparation Cases*, 294 I.C.C. 5, 34-36.

[3] As pointed out by the Commission in *War Materials Reparation Cases*, *supra*, where lower "export" rates were established on shipments moving to the Pacific ports for exportation in order to meet competition of the alternate water routes to those ports, the "rules were designed * * * to make certain that such rates would apply only on traffic affected by the particular competitive conditions * * *." 294 I.C.C. at 36.

not and, in circumstances where the shipment constitutes *bona fide* export traffic while under rail movement, the carrier, upon receipt of the export rate, has procured all the benefits that it expected when it entered into the contract. The granting of an additional benefit—namely, the application of the higher domestic rate because war conditions rendered impossible either actual exportation or the performance of some other non-material condition—would have the sole effect of conferring a windfall.

From the standpoint of the shipper, the situation is the direct opposite. Having made the shipment to the New York port with the purpose of exportation, it quite properly relied on the carrier's representation that the goods would be carried at the lower export rate, a rate patently designed to foster the carrier's business by encouraging shipments of goods intended for export on the lines of the carrier. Denial of the benefits of this rate because intervening developments, occasioned by events over which the shipper had no control and having no bearing upon the services rendered by the carrier, prevented the achievement of the shipper's ultimate and unquestionably *bona fide* purpose, would heap an unwarranted penalty upon a shipper already disappointed by the frustration of his principal contract.

These shipments were *bona fide* export shipments when they were made. There was no intention to do anything other than have them placed aboard ship for transportation abroad; vessel space had been reserved; they remained in the carrier's possession upon arrival at the port of New York for delivery to shipside until their exportation from that port was "frustrated"; and, after necessary diversion to other ports, they were

in fact exported. The sole circumstance which prevented the export tariff from applying in terms was due to conditions entirely beyond the control of either party. Patently, there were no transportation factors involved which made these shipments domestic movements on which the domestic rates were automatically the "lawful", that is, reasonable, rates. On the other hand, there were, as we have noted, numerous transportation considerations which made charges based upon the domestic rates unreasonable as applied to these shipments.[4]

One might formulate the result reached by saying that the single unsatisfied condition upon which the application of the export rate depended, *i.e.*, loading the shipments on vessels at New York, was excused by an impossibility which was beyond the contemplation or the control of the contracting parties and that to impose an additional charge in these circumstances would be a misconstruction of the tariffs. Or one may state the proposition, as did the Commission and the court below, in these terms: that to apply the higher rate in these extraordinary circumstances would result in an unreasonable charge because it would

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[4] The administrative record, as pointed out in the Statement, *supra*, shows that the shipments were intended for export and were so marked; that shipping charges were prepaid at export rates; that arrangements for vessel space were made prior to shipment; that each shipment remained in the continuous possession of the carrier until it was found that exportation from the Port of New York was not possible; that all transportation conditions of the export tariff were complied with literally except actual delivery shipside; and that failure to export through that port was the result of conditions beyond the control of the parties. All of these are plainly "transportation considerations" to which the Commission looked and upon which the Court of Appeals relied in stating that the Commission "properly has weighed all pertinent factors."

make the rate dependent upon a fortuitous circumstance which was not designed, either by the rate maker or by the shipper, to govern the transportation performed.[5] Under either formulation, the result is the same.

2. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, and *A. T. & S. F. Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591 (Comm. Ct.), relied upon by petitioner (Pet. 8-10), are inapposite. In each of those cases, the Commission reduced to a prior level an increased rate established by the railroads for the transportation of a particular commodity. The Commission's reason, in each instance, was to assist an industry in its competition for markets. In this situation, it was held that the Commission exceeded its statutory authority when it condemned the rate for reasons having no relation to transportation considerations. It was in this context that this Court pointed out in *Southern Pacific* that the Commission erroneously failed to determine the intrinsic reasonableness of the rate. But in the present case the government was not seeking lower domestic rates on iron and steel articles. And, contrary to petitioner's conclusion (Pet. 12), the Commission did not "condemn" the domestic rates. As noted above, it had no occasion to do so, for the question presented involved no attack upon the domestic rate level.

Nor is there merit in petitioner's contention that the Commission's decision violated the rule of *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U.S. 370. There, this Court held that the Commission, by chang-

[5] See *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 68, where this Court indicated that the reasonableness of a tariff "as applied" was an issue for resolution by the Commission.

ing its view as to the reasonableness of a particular rate which it had previously prescribed as a reasonable maximum for the future, was not empowered to award reparations on shipments made under the outstanding tariff. Thus, the Court stated (284 U.S. at 390):

> Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and *upon the same or additional evidence as to the fact situation existing when its previous order was promulgated*, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by *what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.* [Emphasis supplied.]

Here, in contrast, the Commission has made no retrospective determination that rates previously determined to be reasonable might not be applied to past shipments. It has held, rather, that the domestic rates, which are concededly reasonable as generally applied, would be unreasonable if applied in extraordinary circumstances neither contemplated nor fairly deemed within their coverage. There is accordingly no conflict of decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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